WONG KAM MING

v.

CHANG FEI CHING

HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
[CIVIL SUIT NO: S-22-64-2010]
16 NOVEMBER 2011

CONTRACT: *Contingent contract - Non-fulfilment of condition precedent - Agreement for sale and purchase of land - Frustration - Plaintiff unable to obtain consent of Director of Lands and Surveys to transfer land - Agreement impossible to perform - Whether plaintiff/vendor bound to refund deposit paid under the agreement - Contracts Act 1950, ss. 32, 57(2) & 66 - Rules of the High Court 1980, O. 14A r. 1*

The plaintiff agreed to sell a piece of land ('the land') in Sabah to the defendant, a non-Sabahan, and the parties entered into a sale and purchase agreement ('SPA'). The sale was subject to the plaintiff obtaining consent of the Director of Lands and Surveys ('the Director') to transfer the land to the defendant ('the consent to transfer'). The Director rejected the plaintiff's application for the consent to transfer on the ground the land was transferrable only to landless Sabahans. Prior to the signing of the SPA, the plaintiff had executed a Power of Attorney ('PA') appointing one Lim Hee Peng ('Lim') to execute and do certain acts and things in relation to the land on the plaintiff's behalf. Lim had collected RM64,554 from the defendant for the purpose of executing his powers under the PA and allegedly made representations to the defendant that the land could be sold to any Malaysian including non-Sabahans.

The plaintiff sued to declare the SPA terminated for non-fulfilment of the condition precedent of obtaining the consent to transfer. He also wanted the court to declare the contract frustrated and his obligations under the SPA discharged. *Vide* encl. 14, the plaintiff applied under O. 14A r. 1 of the Rules of the High Court 1980 for certain questions of law to be determined including (i) whether the SPA was a contingent contract under s. 32 of the Contracts Act 1950 ('the Act') (ii) whether the SPA was void for non-fulfilment of condition precedent and/or for frustration under s. 57(2) of the Act (iii) whether the PA authorised Lim to make

representations about the land to the defendant or to collect monies from him and (iv) whether, if the SPA was void, the plaintiff was bound to refund to the defendant the deposit paid under the SPA as well as the money the defendant had paid to Lim.

Held (allowing encl 14 with costs and striking out the defendant's counterclaim with costs):

(1) The SPA was a contingent contract subject to the condition precedent of the plaintiff obtaining the consent to transfer. (para 19)

(2) The SPA was void for non-fulfilment of the condition precedent as well as for frustration under s. 57(2) of the Act. The SPA was impossible of performance since the Director refused to grant consent to transfer. This was beyond the control of both parties. The Director's decision was non-appealable as it was made in exercise of his discretion. (paras 23, 25 & 30)

(3) The PA did not authorise Lim to request for, collect, receive or accept any payment from the defendant for the purpose of executing his powers under the PA. The plaintiff had also never requested nor authorised the defendant to pay any money to Lim. The payment of RM64,554 and the letter of acknowledgement of payment from Lim were all between the defendant and Lim which the plaintiff had no knowledge of. (paras 32 & 36)

(3a) The plaintiff never authorised Lim to make any representation to the defendant that the land could be sold to any Malaysian including non-Sabahans. The plaintiff had no knowledge if Lim had made such representations to the defendant, which was in excess of his authority under the PA. (paras 39-40)

(4) The plaintiff was bound to refund the deposit and part-payment of RM36,888 to the defendant but not the RM64,554 which the defendant had paid to Lim. (paras 42-44)

[The defendant was ordered to return the original issue document of title for the land to the plaintiff.]

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 PC ***(refd)***

Borhill Estates Sdn Bhd & 2 Ors v. Kandis Holdings Sdn Bhd & 2 Ors [2005] 1 LNS 29 HC ***(refd)***

Chee Keng Industries Sdn Bhd v. Masalam Sdn Bhd & 6 Ors [2000] 1 LNS 179 HC ***(refd)***

Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara [2006] 4 CLJ 981 HC ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Ng Kheng Yong v. Seng Hup Realty Co Sdn Bhd & Another Appeal [2004] 2 CLJ 857 CA ***(refd)***

S P H De Silva v. I S David [1972] 1 LNS 130 HC ***(refd)***

Subramania Pillay v. Sundarammal [1968] 1 LNS 148 FC ***(refd)***

Tan Beng @ Tan York Soon v. Ji Kang Dimensi Sdn Bhd & Anor [2001] 1 LNS 336 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 32, 57(2), 66

Rules of the High Court 1980, O. 14A r. 1

Other source(s) referred to:

Malaysian High Court Practice 2010, Issue 27, p 858

For the plaintiff - Leong Jing Jing; M/s Peter Lo & Co

For the defendant - Chong Kian Ming; M/s Tan Chong & Assocs

Reported by Ashok Kumar

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] This is my ruling in respect of the plaintiff's application on the part of the plaintiff dated 1 April 2011, that is encl. 14 under O. 14A r. 1, Rules of the High Court 1980 (hereinafter referred to as "the said application") for an order that the following questions of law be determined before the full trial of the action:

(a) Whether the Sale and Purchase Agreement between the plaintiff and the defendant is a contingent contract under s. 32 of the Contracts Act 1950;

(b) If the answer to (a) is affirmative, whether the Sale and Purchase Agreement between the plaintiff and the defendant becomes void for non-fulfilment of condition precedent/for want of permission to transfer, ie, the Director of Lands and Surveys refused to grant permission to transfer on the ground that the Oil Palm Plantation known as Lot No. 62, Koyah, Kinabatangan, Sabah held under Title No. CL 095313465 measuring approximately 15.37 acres (hereinafter referred to as "the said land") is transferable to landless Sabahan only;

(c) Alternatively, whether the Sale and Purchase Agreement between the plaintiff and the defendant becomes void on the ground of frustration under s. 57(2) of the Contracts Act 1950 that by reason of refusal by the Director of Lands and Surveys to grant permission to transfer following the unexpected restriction that the said land is transferable to landless Sabahan only, which is not stated in the title of the said land;

(d) Whether the terms of the power of attorney dated 28 December 2006 empowered and/or allowed and/or authorized Lim Hee Peng to request for or collect or receive or accept any payment from the defendant namely, RM64,554 for the purpose of executing his powers granted by the power of attorney;

(e) Whether the terms of the power of attorney dated 28 December 2006 empowered and/or allowed and/or authorized Lim Hee Peng to represent or make representation to the defendant that the said land can be sold to any Malaysian including non-Sabahan as there is no such restriction endorsed on the title of the said land;

(f) In the event if the court decides that the Sale and Purchase Agreement between the plaintiff and the defendant becomes void for either non-fulfilment of condition precedent/want of permission to transfer or on the ground of frustration, by virtue of s. 66 of the Contracts Act 1950, whether the plaintiff is liable or bound to refund or restore any benefit or advantage received under the Sale and Purchase Agreement between the plaintiff and the defendant as follows:

(i) To refund or restore to the Defendant deposit and part payment of RM36,888.00 paid to the Plaintiff only; or

(ii) To refund or restore to the Defendant deposit and part payment of RM36,888.00 paid to the Plaintiff together with a sum of RM64,554.00 (15.37 acres x RM4,200.00 per acre) paid to Lim Hee Peng.

Background

[2] The plaintiff and the defendant have entered into a Sale and Purchase Agreement on 6 April 2007 whereby the plaintiff has agreed to sell the said land and the defendant has agreed to purchase the said land for a total purchase price of RM122,960 upon the terms and conditions contained in the agreement (hereinafter referred to as "the said agreement").

[3] Prior to the signing of the said agreement, the plaintiff has executed power of attorney dated 28 December 2006, appointing Lim Hee Peng to be his true and lawful attorney for him and on his behalf to execute and perform certain acts and things in relation to the said land (hereinafter referred to as "the said power of attorney").

[4] Pursuant to the said agreement, the plaintiff wrote to the Director of Lands and Surveys by a letter dated 14 March 2007 to apply for permission to transfer the said land to the defendant.

[5] In the meantime, the plaintiff's solicitors forwarded the original issue document of title for the said land together with their letter dated 23 March 2007 to the defendant's solicitors which the defendant's solicitors had acknowledged receipt of the said document of title by their letter dated 12 April 2007.

[6] The Director of Lands and Surveys had, by his letter dated 22 June 2007 informed the plaintiff's solicitors, that Lands and Surveys Department refused to grant permission to transfer as the said land is transferable to landless Sabahans only. The defendant's solicitors had been duly informed of the same by a letter dated 25 July 2007 from the plaintiff's solicitors.

[7] The plaintiff and the defendant could not reach an agreement in respect of the termination of the said agreement. The plaintiff subsequently commenced legal proceedings on 15 October 2010 to seek for a declaration that the said agreement was terminated *ipso facto* on non-fulfilment of the condition precedent and to return the original issue document of title for the said land

to the plaintiff. Further or in the alternative, the plaintiff also seeks for a declaration that the contract has been frustrated and that the plaintiff is discharged from his obligation to perform the contract.

[8] The defendant then filed his statement of defence together with his counter-claim dated 14 December 2010. In reply to the defendant's statement of defence, the plaintiff had also filed his reply to the defendant's statement of defence and defence to the defendant's counter claim.

[9] The plaintiff then filed an application under O. 14A r. 1, Rules of the High Court 1980 dated 1 April 2011 (encl. 14). The plaintiff subsequently filed an application by way of summons in chamber dated 11 May 2011 supported by an affidavit affirmed on 11 May 2011 (encl. 16) to amend encl. 14. The defendant had no objection to the plaintiff's application to amend encl. 14 (encl. 16) and the court granted an order in terms for the plaintiff's application to amend on 2 June 2011.

Law And General Principles Governing O. 14A r. 1, Rules Of The High Court 1980

[10] The *Malaysian High Court Practice* 2010 Issue 27, at p. 858 states:

> The test of whether the question of law or construction is suitable to be determined under this order is *whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted*, and this postulates that *there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question*. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action ... In cases where all the relevant evidence is before the Court , and **where the point of law depends entirely on the construction of relevant documents** and it is not suggested that any further evidence could be available, it would be appropriate for the question to be dealt with under Order 14A rather than to allow it to go to trial.
> (emphasis added)

[11] It is undisputed that the plaintiff has actually made the relevant application to the Director of Lands and Surveys, by a letter dated 14 March 2007 issued by the plaintiff's solicitors, for the permission to transfer the said land to the defendant. This can be seen under paragraph no. 8 of the defendant's affidavit in opposition. Further under paragraph no. 8 of the defendant's affidavit in opposition as well as paragraph no. 8 of the defendant's statement of defence, the defendant has admitted and it is indisputable fact that the plaintiff, through his solicitors, by a letter dated 25 July 2007 to the defendant's solicitors, had informed the defendant that the Director of Lands and Surveys had refused to grant permission to transfer for the sale of the said land to the defendant, who is a West Malaysian, ie, non-Sabahan. A copy of the letter from the Director of Lands and Surveys dated 22 June 2007 and letter from the plaintiff's solicitors to the defendant's solicitors, both exhibits marked as exhs. "P2" and "P3" respectively. I further noted that the defendant in his statement of defence, paragraph no. 1, has also admitted that he is a non-Sabahan and that the defendant has admitted and is aware that the said land cannot be transferred and agreed that the sale and purchase transaction cannot be proceeded unless and until the Director of Lands and Surveys grants permission to transfer. This is can be seen in paragraph no. 3 of the defendant's statement of defence and paragraph no. 8 of the affidavit in opposition.

[12] I noted that both the plaintiff and the defendant also have no dispute over the existence and the contents of the said power of attorney.

[13] The *Malaysian High Court Practice 2010* Issue 27, at p. 858 states:

> Order 14 is different in nature from Order 14A. Under Order 14, the Court has to decide whether there is a triable issue that ought to go for trial whereas under Order 14A, the Court makes an actual determination on any question of law or construction of any documents and makes a decision as to whether the action should be allowed or be dismissed: see *L'Grande Development Sdn Bhd v. Bukit Cerakah Development Sdn Bhd* [2007] 4 MLJ 518.

[14] The defendant contended that a full trial is necessary *inter alia* to hear the oral testimonies of Lim Hee Peng, the plaintiff, the defendant, the plaintiff's representatives, Mr Oh and Mr Law, the

A agent and/or representative of the defendant, Mr Lam Chak Yong and the relevant officer from the Lands and Survey Department. The defendant further contended that paras. 30 and 31 of the plaintiff's submission clearly showed that whether Lim Hee Peng as the plaintiff's power of attorney has exceeded the powers and B authority of the said power of attorney dated 28 December 2006 are highly disputed. Another contention of the defendant was that the plaintiff's refusal and/or failure to appeal against the decision of the Lands and Survey Department was fatal as the Lands and Survey Department did not reject the plaintiff's application for C permission to transfer the said land and stated that they were unable to process the same.

[15] Having perused the relevant pleadings and affidavits, exhibits and the respective submissions of counsels for the plaintiff and the D defendant, I find that on the facts, both the plaintiff and the defendant had no dispute on the existence and the contents of the said agreement, and that all rights and obligations between the plaintiff and the defendants in respect of the sale and purchase of the said land are confined to the four corners of the said E agreement. I find that the questions posed are suitable for determination as questions of law without the full trial of the action and that such determination will finally determine the entire cause or matter or any claim or issue therein.

F **Determination Of The Following Questions Of Law**

[1] Whether The Sale And Purchase Agreement Between The Plaintiff And The Defendant Is A Contingent Contract Under S. 32 Of The Contracts Act 1950

G **[16]** Section 32 of the Contracts Act 1950 states as follows:

> **Section 32 "Contingent Contract"**
>
> A "contingent contract" is a contract to do or not to do something, if some event, collateral to the contract, does or does H not happen.

[17] In the present case, cl. 3 of the said agreement provided as follows:

> It is expressly declared and agreed by the Parties that this sale I and purchase transaction shall be subject to the following conditions precedent:

Clause 3.1: The Vendor undertakes to procure the written permission to transfer the said Land to the Defendant from the Director of Lands & Surveys (hereinafter referred to as "the Permission to Transfer") to the sale and purchase transaction contemplated and to satisfy all the terms and conditions stated therein.

Clause 3.2: The Vendor undertakes to apply for the Permission to Transfer within seven (7) days from the date of this Agreement and shall immediately furnish a copy of the said Application of Permission to Transfer to the Purchaser's Solicitors. In the event that the Permission to Transfer is not obtained and/or the terms and conditions stated therein which are capable of being complied with by the Vendor are not satisfied within five (5) months from the date of this Agreement the Purchaser shall be entitled at the Purchaser's discretion to either terminate this Agreement or to grant an extension of one (1) month to the Vendor for such period as the Parties deem fit.

[18] To answer the above question, I am guided by the following cases:

(a) In *Chee Keng Industries Sdn Bhd v. Masalam Sdn Bhd & 6 Ors* [2000] 1 LNS 179, the court held that by virtue of cl. 4, the sale and purchase agreement of land was conditional upon the conditions stated there, in being fulfilled within the time period provided for in the said agreement. It was a condition of the said agreement that the approval of the Foreign Investment Committee (FIC) of Malaysia for the acquisition of the said land by the Plaintiff shall be obtained.

(b) In *Tan Beng @ Tan York Soon v. Ji Kang Dimensi Sdn Bhd & Anor* [2001] 1 LNS 336, the court held that the sale and purchase agreement is a conditional agreement in that the relevant transfer consent from the proper authority must be obtained by virtue of cls. 6(a), 6(b)(ii) and 7.

(c) In *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282, where the Federal Court held that an agreement for sale of immovable

property subject to the approval of Foreign Investment Committee (FIC) is a contract of sale contingent upon the approval of the transaction by the FIC.

[19] From the above cases and my interpretation of cl. 3 of the said agreement, I find that the said agreement is a contingent contract as the said agreement is subject to condition precedents as stated in cls. 3.1 and 3.2 of the said agreement, that is the procurement of written permission to transfer by the plaintiff (being the vendor), the application for permission to transfer by the plaintiff and upon the permission to transfer being obtained.

[2] If The Answer To [A] Is Affirmative, Whether The Sale And Purchase Agreement Between The Plaintiff And The Defendant Becomes Void For Non-fulfilment Of Condition Precedent/For Want Of Permission To Transfer, Ie, The Director Of Lands And Surveys Refused To Grant Permission To Transfer On The Ground That The Oil Palm Plantation Known As Lot No. 62, Koyah, Kinabatangan, Sabah Held Under Title No. CL 095313465 Measuring Approximately 15.37 Acres (Hereinafter Referred To As "The Said Land") Is Transferable To Landless Sabahans Only

[20] In the present case, the said agreement contained an express clause in the form of cl. 3.1 in the said agreement which contained an undertaking by the plaintiff to procure the necessary written permission to transfer the said land to the defendant from the Director of Lands & Surveys. While cl. 3.2 of the said agreement contained an undertaking by the plaintiff to apply for the necessary permission to transfer within seven days from the date of the said agreement and shall immediately furnish a copy of the said application of permission to transfer to the purchaser's solicitors. Even although the application for permission to transfer was made prior to the date of the said agreement, I find that the plaintiff is not in breach of this clause as contended by the defendant. I am of the opinion that cl. 3.2 was inserted, to ensure that the plaintiff applied for the necessary permission to transfer from the relevant authority as soon as possible which the plaintiff did, *albeit* much earlier than stipulated in the said cl. 3.2 and before the date of the said agreement.

[21] Since I find that the said agreement is a conditional agreement that is conditional upon obtaining the necessary permission to transfer which was rejected, this meant that the agreed stipulated event had not happened.

[22] I am guided by the following cases in arriving at my findings: A

(a) In *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] 1 LNS 3, the court held that where the agreement provided that "the purchase is conditional on the vendor obtaining ... a renewal of the seven leases ... so as to be in a position to transfer the same to the purchaser ... and if for any cause whatsoever the vendor is unable to fulfill this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made". That condition remained unfulfilled and it was held by the Privy Council that the purchaser was entitled to the return of his deposits. B C

(b) In *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282, the court held that where the respondents agreed to sell and the appellants agreed to buy certain immovable properties, with the condition, that the sale shall be subject to the approval of the Foreign Investment Committee (FIC). The FIC refused its approval. The agreement was silent on the effect upon the agreement of non-approval of the FIC but contained a proviso that "all monies paid by the purchaser hereunder shall be returned to the purchaser in the event that such approval as aforesaid is not given by the FIC". The Federal Court held that the result would not be different whether the requirement of FIC approval was a contingent condition as in *Aberfoyle*'s case or a mere promissory condition as in Property and *Bloodstock*'s case, as in the first case there was no agreement to enforce until the requirement was satisfied whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement. The Federal Court further stated as follows: D E F G

> It is therefore obvious that the parties have entered into a contract of sale, contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as H I

discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled. Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by section 33(a) of the Contracts Act which enacts:

> 33(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with section 33(b) of the Contracts Act, which is as follows:

> 33(b) If the event becomes impossible, such contracts become void.

(c) In *Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2006] 4 CLJ 981, the court held that as follows:

> [45] It boils down to this. A contingent condition is a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, the non-fulfilment of which does not render either party liable in damages to the other, whilst a promissory condition, on the other hand, is an essential term of the contract, the breach of which entitles the innocent party to treat itself as discharged from the contract and to sue for damages, but not in the case where the subsisting agreement is defeated or frustrated by a supervening event which is the non-fulfilment of the promissory condition. And on the true construction of the said agreement when read as a whole, there was no outright lease. The lease was entirely dependent on an uncertain future event. The lease could only take effect if the defendant had obtained the title to the said land. The defendant had not obtained the title to the said land, and in the upshot there was no enforceable agreement. The result would not be any different even if it were that the requirement of the title was a promissory condition; the said agreement was defeated or frustrated by the non-fulfilment of a requirement that worked put to be that the defendant must first obtain the title to the said land. The defendant had not prevented the fulfilment of that requirement. Where it could,

> the defendant had duly carried out the provisions of the said agreement, as in the delivery of the said land for the open-air car-park. The defendant had not breached the said agreement. It was just that the said agreement in relation to the lease was impossible to perform.

[23] Applying the above principles as laid down in the above cases to the present case, I find that the said agreement is void for non-fulfilment of condition precedent/for want of permission to transfer the said land to the defendant. The said agreement was impossible to perform since the Director of Lands and Surveys in the exercise of his discretion, has refused to grant the permission to transfer the said land to the defendant, which is beyond the control of both the plaintiff and the defendant.

[3] Alternatively, Whether The Sale And Purchase Agreement Between The Plaintiff And The Defendant Becomes Void On The Ground Of Frustration Under s. 57(2) Of The Contracts Act 1950 That By Reason Of Refusal By The Director Of Lands And Surveys To Grant Permission To Transfer Following The Unexpected Restriction That The Said Land Is Transferable To Landless Sabahans Only, Which Is Not Stated In The Title Of The Said Land

[24] In the present case, I find that when both the plaintiff and the defendant entered into the said agreement, they were fully aware that there is a special term under the title of the said land as follows:

> Transfer and sublease of this Title is prohibited unless the written permission of the Director of Lands and Surveys is first obtained.

[25] Thus I find that it is expressly agreed between the plaintiff and the defendant, that the said agreement or sale and purchase transaction is subject to the permission to transfer of the Director of Lands and Surveys being obtained as incorporated under cl. 3 of the said agreement. Pursuant to cl. 3.1 and 3.2, the plaintiff duly applied to the Director of Lands and Surveys for the necessary permission to transfer. However, the plaintiff's application was rejected by the Director of Lands and Surveys on grounds that the application for transfer of the said land cannot be processed as the said land is exclusively for landless Sabahans only. In the present case, it is not disputed that the defendant is a non-Sabahan and I agree with the contention of the plaintiff that the decision of the Director of Lands and Surveys is non-appealable as it is a decision by the Director of Lands and Surveys in the exercise of his discretion.

[26] I am guided by the case of *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 where the Federal Court stated as follows:

> However, even if we hold that the requirement as to FIC approval is no more than a term - essential term of the agreement, the result would still be the same. If it is a mere term of the contract the non-approval by FIC of the deal certainly defeats the sale because such an approval would then constitute a supervening event rendering the contract void under s. 57(2) of the Contracts Act. This view was in fact expressed by Lord Danckwerts in *Property & Bloodstock*'s case *(supra)* when he said:
>
> > Of course, if the necessary consent by the landlords to the assignment cannot be obtained, it defeats the sale, but this is a supervening event. (P. 329C)
>
> Thus in so far as the principal issue is concerned whether we hold the requirement as to FIC approval is a contingent condition as in *Aberfoyle*'s case or as a mere promissory condition - ie, mere term of the agreement as in *Property and Bloodstock*'s case *(supra)* the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract, it was, however, defeated or frustrated by a supervening event, which is the non-fulfilment of the requirement and in this case also the deposit was refundable as money had and received for the use of the appellants who had paid it ... .

[27] I am also guided by the case of *Ng Kheng Yong v. Seng Hup Realty Co Sdn Bhd & Another Appeal* [2004] 2 CLJ 857, where the appellant entered into a sale and purchase agreement with the respondent for the sale of a plot of land known as Lot 129. Under the terms of the agreement, the appellant as vendor was responsible for obtaining the conversion and subdivision of the said land. The appellant therefore submitted an application for conversion and subdivision of Lot 129 to the Pejabat Pengarah Tanah dan Galian Perak ('PTG'). The application was rejected. The appellant then appealed to the Chief Minister of Perak but the appeal was rejected. In considering whether the learned judge was correct in finding that the agreement was frustrated, the Court of Appeal stated as follows:

> In *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & 3 Ors* [2000] 3 CLJ 666 Gopal Sri Ram JCA said:

The law of frustration is contained in s. 57(2) of the Contracts Act 1950 which read:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or lawful.
>
> The section postulates two supervening events that frustrates a contract. The first is an event that makes the contract impossible of performance: the second is the event of supervening illegality.

... There was to a certain extent a change in policy on the part of the authorities and this can be gleaned from the explanation forwarded by the respondent's solicitors in their letter to the appellant dated 7th November 2000 wherein in the former explained "the change in the layout plan" annexed to the agreement was to conform "with the Master Plan Layout for the area at the Town Planning and is subsequent to approval of the final 'P.U. Pelan'". What is clear is that the parties did not foresee this when they entered into the agreement, viz., they did not make such a provision for this in the agreement. In our view, the introduction of the Master Layout Plan for the area by the Town Planning authority, being tantamount to a change in Government policy, is a ground of discharge as it introduced new and unexpected conditions and restrictions which affected the original layout plan annexed to the agreement. Ordering the appellant to agree to a new layout plan as submitted by the respondent is tantamount to rewriting the agreement. The parties entered into the agreement which depended upon a possible approval for conversion and subdivision to be forthcoming from the PTG based upon the original layout plan. That application was rejected. Upon that happening, the agreement has to be regarded as dissolved by reason of circumstances beyond the control of the parties. The foundation upon what the parties have deemed to have had in contemplation had dissipated when the application for conversion and subdivision was rejected. This would be a ground on which to rest the doctrine of frustration.

It is not disputed that the PTG rejected the appellant's application for conversion and subdivision on 5 February 1990. His appeal to the PTG was also rejected. His appeal to the Menteri Besar met a similar fate. The appellant's duty under the agreement was to obtain conversion and subdivision of Lot 129. That application was rejected. He has performed by doing all that was required of him. We are of the view that the parties intended to perform only if the approval for conversion and subdivision was obtained ...

A The Master Layout Plan, the effect of which would amount to a change in policy is the supervening event which had frustrated the agreement.

[28] The defendant contended that under paragraph no. 11 of his affidavit in opposition that the said agreement has not been B frustrated as not all avenues to perform the said agreement have been exercised. The defendant further contended that, in any event, the defendant can still nominate a Sabahan to perform the said agreement as stated in cl. 1.8.1 of the said agreement. I find this contention of the defendant has no merits based on the C following reasons:

(a) Clause 11.8.1 of the said agreement is not one of the condition precedent which the said agreement is subject to; and

D

(b) The defendant's contention is a vehicle to circumvent the refusal by the Director of Lands and Surveys to give permission to transfer and the express title condition of the said land and more importantly to frustrate the Sabah State E government land policy.

[29] I refer to the case of *Borhill Estates Sdn Bhd & 2 Ors v. Kandis Holdings Sdn Bhd & 2 Ors* [2005] 1 LNS 29 where the court held as follows:

F It is painfully apparent from the evidence adduced that such good intentions cannot be ascribed to Datuk Hii whose undisguised intention was from the outset to buy the CL lands as well as the NT lands. The Plaintiffs are mere tools used by Datuk Hii to orchestrate the devious scheme to circumvent the relevant G statutory prohibition against dealings over native title land between non-natives and natives. The Plaintiffs were enjoined to enter into an agreement for a lease on the pretext of bringing the transaction within the exception to Section 17(1) provided by Section 17(5) of the Sabah Land Ordinance. Both the two proposed agreements for a lease between the 1st Plaintiff and the 2nd Plaintiff and H between the 1st Plaintiff and the 3rd Plaintiff are in fact akin to transfers of native title land to a non-native disguised as an agreement for a lease.

[30] Applying the above stated authorities to the facts of this case, I also find that the said agreement is void on the ground of I frustration under s. 57(2) of the Contracts Act 1950.

[4] Whether The Terms Of The Power Of Attorney Dated 28 December 2006 Empowered And/Or Allowed And/Or Authorized Lim Hee Peng To Request For Or Collect Or Receive Or Accept Any Payment From The Defendant Namely, RM64,554 For The Purpose Of Executing His Powers Granted By The Power Of Attorney

[31] I find that both the plaintiff and the defendant had no dispute over the existence and the contents of the said Power of Attorney and that all powers and authorities of Lim Hee Peng as the attorney or representative of the plaintiff are confined to all four corners of the said Power of Attorney.

[32] I further find that the plaintiff has not or never requested and/or authorised the defendant to pay any money to Lim Hee Peng and that the payment of RM64,554 and the letter of acknowledgment of payment from Lim Hee Peng are all between the defendant and Lim Hee Peng, which the plaintiff has no knowledge of at all.

[33] The said Power of Attorney stated as follows:

> Now This Deed Withnesseth that we, the several persons more particularly described in the Schedule hereto Doth Hereby Irrevocably Appoint our Attorney to be our true and lawful attorney for us and on our behalf and in our names to do execute and perform all or any of the following acts or things in relation to the said Lands.
>
> 1. To enter into the said Lands for inspection purposes.
>
> 2. To obtain all necessary licences permits passes and other authorities from the relevant Government authorities for the purpose of entering upon the said Lands.
>
> 3. To survey or cause to be surveyed the said Lands and for that purpose to appoint such person/s for the re-survey and to pay all fees and expenses in respect of the re-survey of the said Lands.
>
> 4. To evict the occupier/s of the said Lands and if necessary, to negotiate for payment of compensation to the relevant person/s for the investment and expense duly invested by them in the said Lands.
>
> 5. To employ and pay Solicitors, Surveyors, Accountants and other agents to effectively carrying out any of the powers contained in this Power of Attorney.

[34] In *S P H De Silva v. I S David* [1972] 1 LNS 130, the court stated as follows:

> An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usage of the trade, or the course of business between the parties.

[35] Further in *Subramania Pillay v. Sundarammal* [1968] 1 LNS 148, the Federal Court stated as follows:

> Now the principle is this, as was stated by their Lordships of the Privy Council in Bryant, Powis ad *Bryant v. La Banque du Peuple* [1893] AC 170 at p. 177:
>
> > ... powers of attorney are to be construed strictly - that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication fair express terms or by necessary implication.

[36] From my perusal of all clauses in the said Power of Attorney, I find that there is nothing or no clauses in the said Power of Attorney which empowered and/or allowed and/or authorized Lim Hee Peng to request for or collect or receive or accept any payment from the defendant namely, RM64,554 for the purpose of executing his powers granted by the said Power of Attorney.

[37] I noted that the defendant contended under para. 4 of his affidavit in opposition, that the payment of RM64,554 was within the powers donated to Lim Hee Peng, pursuant to the said Power of Attorney in relation to the said land as follows:

(a) to evict the occupiers, squatters and/or any other parties on the said land at the time of the delivery of management of the said land to the defendant and/or to pay compensation to such parties.

(b) to obtain all necessary licence, permit, passes and other authorities from the relevant Government authorities for the purpose of entering upon the said land.

(c) to survey or cause to be surveyed the said lands and for that purpose to appoint such person(s) for the re-survey and to pay all fees and expenses in respect of the re-survey of the said lands.

[38] I am unable to agree with the above contention of the defendant as it is clear that under cl. 4 of the said Power of Attorney, the plaintiff only intended to empower Lim Hee Peng to evict the occupiers and if necessary to negotiate for payment of compensation. At best, I find that Lim Hee Peng only has the power or authority to negotiate for payment and not to request for or collect or receive or accept any payment from the defendant. Neither did cl. 4 of the said power of Attorney gives power or authorizes Lim Hee Peng to make payment to such parties as alleged by the defendant.

[5] Whether The Terms Of The Power Of Attorney Dated 28 December 2006 Empowered And/Or Allowed And/Or Authorized Lim Hee Peng To Represent Or Make Representation To The Defendant That The Said Land Can Be Sold To Any Malaysian Including Non-Sabahans As There Is No Such Restriction Endorsed On The Title Of The Said Land

[39] Having perused the said Power of Attorney, I find that the plaintiff has not or never empowered and/or allowed and/or authorized Lim Hee Peng to represent or make representation to the defendant that the said Land can be sold to any Malaysian including non-Sabahans and that the plaintiff has no knowledge at all that Lim Hee Peng has made such representation as alleged by the defendant.

[40] I find that the said Power of Attorney did not empowered and/or authorise Lim Hee Peng, to represent or make representation to the defendant that the said Land can be sold to any Malaysian including non-Sabahans. Thus Lim Hee Peng has exceeded his actual authority as provided under the said Power of Attorney when he represented or made representation to the defendant that the said Land can be sold to any Malaysian including non-Sabahans as there is no such restriction endorsed on the title of the said land as alleged by the defendant. I agree with the plaintiff's contention that the defendant knew or ought to have known that Lim Hee Peng did not have the power or authority to represent or make representation to the defendant that the said land can be sold to any Malaysian including non-Sabahans as there is no such restriction endorsed on the title of

the said land, without the consent of the plaintiff, since the defendant is aware or has knowledge of the contents/terms of the said Power of Attorney.

[6] In The Event If The Court Decides That The Sale And Purchase Agreement Between The Plaintiff And The Defendant Becomes Void For Either Non- Fulfilment Of Condition Precedent/Want Of Permission To Transfer Or On The Ground Of Frustration, By Virtue Of Section 66 Of The Contracts Act 1950, Whether The Plaintiff Is Liable Or Bound To Refund Or Restore Any Benefit Or Advantage Received Under The Sale And Purchase Agreement Between The Plaintiff And The Defendant As Follows:

(i) To refund or restore to the defendant deposit and part payment of RM36,888 paid to the plaintiff only; or

(ii) To refund or restore to the defendant deposit and part payment of RM36,888 paid to the plaintiff together with a sum of RM64,554 (15.37 acres x RM4,200 per acre) paid to Lim Hee Peng.

[41] Section 66 of the Contracts Act 1950 stated as follows:

> **66. Obligation of person who has received advantage under void agreement, or contract that becomes void**
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[42] In the present case, the plaintiff has admitted and it is not disputed between the parties that the plaintiff has received deposit and part payment of RM36,888 from the defendant upon signing the said agreement. Therefore, the plaintiff is bound or liable to refund or restore deposit and part payment of RM36,888 to the defendant.

[43] There is the sum of RM64,554 (15.37 acres x RM4,200 per acre) paid by the defendant to and received by Lim Hee Peng as the holder of the said Power of Attorney. The issue is whether the plaintiff is bound to repay the said sum of RM64,554 to the defendant. I find that Lim Hee Peng has no power or authority or rather has exceeded his actual authority under the said Power of Attorney when he requested for or collected or received the said sum of RM64,554 from the defendant. In the premises I find

that the plaintiff should not be liable or bound to refund or restore the sum of RM64,554 (15.37 acres x RM4,200.00 per acre) paid by the defendant to and received by Lim Hee Peng.

Order

[44] In the light of the aforesaid I find as follows:

(1) That the said agreement between the plaintiff and the defendant is a contingent contract under s. 32 of the Contracts Act 1950;

(2) That the said agreement becomes void on the ground of frustration under s. 57(2) of Contracts Act 1950;

(3) The terms of the said Power of Attorney do not empower and/or authorise Lim Hee Peng to request for or collect or receive or accept any payment from the defendant namely RM64,554;

(4) The terms of the said Power of Attorney do not empower and/or allow and/or authorise Lim Hee Peng to represent or make representation to the defendant, that the said land can be sold to any Malaysian including non-Sabahans;

(5) That the said agreement becomes void on the grounds of frustration, by virtue of s. 66 of the Contracts Act 1950. As such the plaintiff is only liable or bound to refund or restore deposit and part payment of RM36,888 received from the defendant upon signing the said agreement. However, the plaintiff should not be liable or bound to refund or restore the sum of RM64,554 (15.37 acres x RM4,200 per acre) paid by the defendant to and received by Lim Hee Peng;

(6) The defendant or his solicitor namely Messrs Lam Wai Tze & Co, shall return the original issue document of title for the said land to the plaintiff;

(7) That an order in terms of this application by the plaintiff be granted with costs.

(8) In the light of the above, I order that the defendant's counterclaim be struck out with costs, to be taxed unless agreed.